Seneca Electric Company; Seneca Controls, Inc. *and* Local 82, International Association of Machinists and Aerospace Workers, AFL-CIO. Cases 7-CA-18571, 7-CA-18748, 7-CA-18751, 7-CA-19456, and 7-CA-19457

December 16, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On June 3, 1982, Administrative Law Judge Bruce C. Nasdor issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings, and conclusions[1] of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the complaint herein be, and it hereby is, dismissed in its entirety.

[1] As we find timely the January 28, 1981, furnishing of information by Respondent Seneca Controls, Inc., to the Union, we find it unnecessary to pass on the Administrative Law Judge's statement that after a decertification petition was filed on January 5, 1981, Respondent SCI was not legally obligated to furnish information to the Union.

DECISION

STATEMENT OF THE CASE

BRUCE C. NASDOR, Administrative Law Judge: This case was heard at Detroit, Michigan, on November 2, 3, and 4, 1981.

The complaint in this matter raises the following substantive issues:

1. Whether Respondent's agent Robert Fortunate, president of Seneca Electric Company (hereinafter referred to as SEC), and Seneca Controls, Inc. (hereinafter referred to as SCI), attempted to undermine the authority of the Union by presenting collective-bargaining proposals which had not been previously proposed to the Union, during negotiations, in violation of Section 8(a)(1) and (5) of the Act.

2. Whether SEC violated Section 8(a)(1) and (5) of the Act by offering a better wage-benefit package to perspective strike replacements than had been offered to the Charging Party Union during negotiations.

3. Whether SEC violated Section 8(a)(1) and (3) of the Act by discharging David Zehel because of his protected strike activities.

4. Whether SEC violated Section 8(a)(1), (3), and (5) of the Act by failing to pay vacation moneys to certain employees of SEC who engaged in the strike.

5. Whether SCI violated Section 8(a)(1) and (5) of the Act by failing to pay vacation moneys owed to James Giordana and Rose Miller.

6. Whether SEC violated Section 8(a)(1) and (5) of the Act by failing and refusing to timely furnish requested information necessary and relevant to the Union's performance of its collective-bargaining obligations.

Other peripheral issues to be resolved involve pleading, practice, and procedure.[1]

Upon the entire record, including my observation of the demeanor of the witnesses, and after due consideration of briefs, I make the following:

FINDINGS OF FACT

I. JURISDICTION

It is admitted and I find that SEC maintains a place of business in Detroit where it has been at all times material herein engaged in the repair, sale, and distribution of electric motors and related products. At all times material herein, SEC in the course and conduct of its business operations repaired, sold, and distributed at its Detroit, Michigan, place of business products valued in excess of $500,000, of which products valued in excess of $50,000 were shipped from said plant directly to points located outside the State of Michigan.

SCI maintains a place of business in Fraser, Michigan, where it has been at all times material herein engaged in the manufacture and sale of electronic control panels and related products. At all times material herein, SCI in the course and conduct of its business operations manufactured and sold products valued in excess of $500,000. During this same period of time, it caused to be shipped to its Fraser plant directly from points outside the State of Michigan goods and materials valued in excess of $50,000.

Both Respondents are now, and have been at all times material herein, employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION

Local 82, International Association of Machinists and Aerospace Workers of America, AFL-CIO (herein referred to as the Union), is a labor organization within the meaning of Section 2(5) of the Act.

III. THE APPROPRIATE BARGAINING UNITS

A. All full-time and regular part-time motor shop employees and those directly associated with motor repair

[1] Other allegations in the complaint regarding the discriminatory discharge of two individuals were withdrawn by counsel for the General Counsel when the hearing opened.

employed by Respondent SEC at its Detroit plant, excluding working foremen, working engineers, office employees, and salesmen, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

B. All full-time and regular part-time control panel employees and those directly associated with control panels employed by Respondent SCI at its Fraser plant, excluding working foremen and excluding office employees and salesmen, constitute a unit appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act.

IV. THE ALLEGED UNFAIR LABOR PRACTICES

For approximately 20 years, the Union has represented a unit of production and maintenance employees of SEC. SCI began operations in September 1979.[2] The Union in the beginning represented the production and maintenance employees of SCI under the collective-bargaining agreement with SEC. In September 1980, SCI executed its own collective-bargaining agreement with the Union which expired on November 14, 1980. The most recent collective-bargaining contract between the parties was effective from November 14, 1977, to November 14, 1980.

Facts Relating to Respondent SEC

Pursuant to the contract, the Union gave a timely 60-day notice to terminate the 1977–80 agreement. The negotiations commenced on October 24, 1980, at the Union's conference hall, where the Union submitted its initial contract proposal. Negotiating on behalf of the Union were business representative James Leslie, committeeman Rick Williams, and Steward Willie Faison. The company negotiators were President Robert Fortunate,[3] Plant Manager Jack Boone, and Sales Representative Tom Ford.

The Union's initial contract proposal, in evidence as General Counsel's Exhibit 2, contains a significant number of items. On October 27, 1980,[4] the next bargaining session, Leslie requested that Respondent submit a written proposal. According to Leslie his request was repeated during the bargaining sessions of October 31 and November 4. During the November 4 bargaining session, Leslie offered Respondent a 1-year extension of the current contract with a wage increase, or a 2-week extension without any wage increase. Respondent rejected the offer. Leslie testified that on November 10, the next bargaining session, he reiterated his request that Respondent submit a written proposal. He also offered to extend the contract 1 year with a wage increase or to extend it 30 days without any increase. Fortunate advised Leslie that Respondent was not yet prepared to make a final offer. Leslie advised Fortunate that this November 10 session would be the last he could attend prior to contract expiration because he was leaving town to go deer hunting. Moveover Leslie advised Fortunate that he could not meet again with Respondent for the remainder of that week and the Union expected a contract settlement offer from Respondent during this session. Finally, Fortunate did offer a package which included, *inter alia*, a change from Blue Cross/Blue Shield to Electrical Apparatus Society of America (hereinafter referred to as EASA), medical insurance, a dental plan, and an optical plan plus an increase in wages. The Union on that date rejected the Company's proposals.

At the end of the November 10 meeting, Fortunate advised Leslie that he was going to meet with the employees and explain Respondent's proposals. Leslie testified that he responded that the Union was the collective-bargaining agent, and it was inappropriate to present to employees proposals that the Union had never had an opportunity to review in writing. Fortunate testified that Leslie made no objection to the statement that he would meet with the employees, and in fact requested that Fortunate first review the proposals with the bargaining committee prior to meeting with the employees.

Following the November 10 bargaining session, Fortunate posted a notice in the plant inviting employees to attend a meeting on November 13 for the purpose of explaining the Company's position on its final contract offer.

On November 12, 1980, in a telephone conversation, Leslie again offered to extend the contract 1 year with a wage increase or to extend it 60 days without any increase. Fortunate rejected the latter proposals because he was concerned that it would qualify employees for collecting holiday pay, Thanksgiving, prior to the commencement of the strike.

On November 13, at approximately 2:30 p.m., Fortunate called Shop Steward Faison and committeeman Williams into his office and gave them copies of the documents that he was going to distribute to the employees at the meeting to be held 1 hour later. These documents are in evidence as Joint Exhibits 4 and 5, and General Counsel's Exhibit 3. Fortunate reviewed the various documents with Williams and Faison and expressed that he intended to meet with the employees to explain Respondent's proposals.

At approximately 3 p.m., on that same day, November 13, employees were instructed through a public address system to assemble in the shop for a meeting. At the meeting, copies of Joint Exhibits 4 and 5 and General Counsel's Exhibit 3 were distributed among employees. Fortunate analyzed comparatively the employees wages and benefits with those at nonunion shops. He then outlined his proposal to the employees based on Joint Exhibits 4 and 5 and answered questions. Fortunate also stated to the assemblage that this was not a bargaining session. In response to a question he stated that if there was a strike and he hired replacements who did not work out he could close the doors and/or file a chapter 11 and go into bankruptcy. Faison so testified.[5]

A striking employee, Gregory Blondell, testified similarly that he attended the meeting and that Fortunate stated this was his final offer, and if it was not accepted

[2] SCI is a wholly owned subsidiary of SEC.

[3] Fortunate, who is an attorney, recently entered the practice of law full time. His partner operates the businesses.

[4] All dates are in 1980 unless otherwise indicated.

[5] This statement is not alleged as an independent violation of Sec. 8(a)(1) of the Act.

he would have to run his business the best way he knew how even if it meant hiring permanent replacements, he would, and if they did not work out, he would close the doors.

Counsel for the General Counsel contends that the following items which were raised at the meeting and contained in Joint Exhibit 4 were never proposed to the Union:

(1) The exclusion of working engineers from the unit.

(2) The 40-hour workweek shall not be construed as a guarantee.

(3) Relevant seniority by plant seniority instead of classification and department and to allow the Company to consider skill and ability when determining layoffs.

(4) Elimination of the truckdriver and electronic technician classifications.

(5) Starting rate lowered to $4 an hour.

(6) Extension of the probationary period from 90 days to 6 months with monthly increments varying from 20 cents an hour to 30 cents an hour instead of 30 cents an hour every month.

(7) Hospitalization insurance changed from Blue Cross/Blue Shield to EASA major medical plan.

(8) Transfer of dental insurance carrier from Kempner to EASA.

Fortunate testified that all of the items claimed to have been proposed for the first time on November 13 were in fact proposed in written form to Leslie at the second meeting on October 27 or November 10.

He specifically testified that he proposed to the Union that working engineers be excluded from the bargaining unit on November 10.

Fortunate also testified that SEC never in the past guaranteed a 40-hour workweek and that its disclaimer of any such guarantee was merely a restatement of a continued policy.

Moreover, Fortunate testified that as early as January 1980, he was involved in a grievance filed by Faison, wherein Faison was grieving that he was more senior in layoff status than an individual who was not laid off. According to Fortunate, as a result of this grievance he and Leslie discussed whether in the future ability and skill levels would also be a consideration when determining who was to be laid off. Fortunate was not clear as to whether Leslie and he actually reached an understanding in this regard. Furthermore, Fortunate addressed this issue, according to his testimony, in discussions he had with the union bargaining committee during the October and November 1980 negotiations, wherein he expressed his views as to why ability and skill should be factors considered during the time of a layoff. Fortunate testified that at the second negotiating meeting on October 27 he discussed Respondent's position concerning the recognition of skill and ability rather than strict seniority, and indeed he embodied this in a written proposal given to the union committee at that meeting. Said proposal is embodied in Respondent's Exhibit 3, which Fortunate testified was given to the committee at the meeting. This was denied by Leslie.

Regarding Respondent's failure to include the truckdriver wage rates within those set forth in Joint Exhibit 4, article XII, Fortunate explained that this was simply a clerical omission; i.e., a mistake.

With respect to Respondent's failure to include wage rates for an electronic technician, it was explained by Fortunate that it was not Respondent's intent to eliminate the job classification but rather to include it within the overall "A," "B," or "C" classification system. Fortunate testified that on at least two occasions, prior to the meeting with employees on November 13, he had proposed to the Union an overall "A," "B," and "C" classification system for all motor shop employees at SEC.

Fortunate testified that the proposed change in the "starter" rates was discussed in the same context as the proposal for extending the probationary period. He testified that these proposals were relayed to the Union during bargaining prior to the November 13 meeting with employees. It is noted that Respondent's Exhibit 3 does make reference to lengthening or extending the probationary period. Respondent's Exhibit 3 is what Fortunate allegedly handed across the table to the union committee on October 27, 1980.

Leslie admits that SEC previously proposed substitution of insurance carriers from Blue Cross/Blue Shield to EASA, but he does not recall any mention of the EASA plan providing for major medical coverage or a new carrier of the dental insurance. Fortunate in his testimony specifically remembered that he discussed the proposal to change over to the EASA plan at the first bargaining session, and that at the November 10 session he offered the EASA plan to the Union stating that it included a major medical plan. This plan was in direct response, according to Fortunate, to the Union's request for major medical coverage. Fortunate also specifically recalled advising the Union on November 10 at the bargaining table that the EASA hospitalization included a separate rider for dental care, and that both of these benefits were part of an entire package which included life, sickness, and accident insurance. Also, on November 10, according to Fortunate, he proposed an optical plan for SEC employees providing $50 for optical coverage which in Leslie's words he found to be "crappy."

The employees of SEC commenced an economic strike on November 17, 1980. On November 16, 1980, SEC placed a help-wanted advertisement in the Detroit Free Press offering, *inter alia,* benefits including hospitalization, major medical, dental, optical, etc. The ad also offered experienced employees an hourly wage rate of from $5 to $9 an hour depending upon experience. It also offered "learners" a $4 hourly rate to be increased to $5 after 6 months. Respondent's payroll records reveal that at the expiration of the old contract experienced employees did receive a 25-cent-an-hour wage increase. For example, employee Ray Dale, an experienced "leader," received a 25-cent increase allowing his hourly wage rate to exceed $9. Therefore, if Respondent is to be credited, the $5 to $9 wage rate depending on experience which appeared in the advertisement offered to replacements did not exceed SEC's offer to the Union. Respondent's same argument is applicable to the "learners" rate and the fringe benefits. Respondent SEC argues that

there was no wage rate or benefit advertised on November 16 that was not made known to the Union on November 10, if not earlier.

On the last day of the hearing, counsel for the General Counsel made a motion to amend the complaint, alleging that Respondent unilaterally implemented a 25-cent-per-hour wage increase in violation of Section 8(a)(1), (3), and (5) of the Act. Respondent strenuously objected, based on the timeliness of the motion. It asserted that this was a violation not closely related to the violations set forth in the charge or complaint, and that a resolution of the additional allegation would necessitate litigation on the issue of impasse. Counsel for the General Counsel concedes that "amendment of the complaint as requested would not entail any remedy different from, or more burdensome than, the remedies already sought."[6] I denied the motion to amend the complaint.

Article 8, section 1, of the expired contract provides that vacations shall be figured from the employees' anniversary date. Section 2 provides, *inter alia.*, that:

> Employees who cease being regular full-time employees by virtue of quitting or discharge only; and provided they have sufficient seniority to qualify for vacation pay under the terms of this agreement, shall be paid pro-rated vacation pay at the time of their job severance based upon one-twelfth of their full vacation pay for each full month worked during their vacation year.

During his testimony, Fortunate was asked his interpretation of a full month. He responded "all scheduled hours during that month, no absenteeism, no tardiness, no refusal to work overtime, a full month, whatever we schedule."

Thus, by his interpretation, it means all scheduled hours during the month not including holiday, vacation time, or sick leave.

Zehel testified that his anniversary date is March 15, 1979. He claimed vacation pay from March 15, 1980, to November 14, 1980, at which time he participated in a strike. Zehel admitted that his absenteeism exceeded that of most employees. Documentary evidence[7] reflects that as of August 8, 1980, he averaged 3.5 days missed per month, which is more than double the average.

Gregory Blondell had an anniversary date of June 4, 1979. He was not discharged during the strike. He did not receive his vacation pay on his anniversary date in 1981. According to his testimony, his vacation pay amounted to approximately $199. Fortunate admitted that Blondell was entitled to his vacation pay.

Union Steward Willie Faison, who was told by Respondent that he was being fired for destroying company property and for picket line misconduct, had an anniversary date of August 17, 1978. He did not receive any vacation pay for the period ending August 17, 1980.

Respondent presented specific evidence that striking employees who were not discharged or quit did receive their vacation pay. In this regard, Fortunate testified relating the names of specific employees who fall into that category.

Facts Relating to Respondent SCI

The vacation provisions in the agreement between SCI and the Union are identical to those in the SEC collective-bargaining agreement.

The Union and SCI entered into collective-bargaining negotiations in October 1980. Leslie and Rose Miller, union steward, represented the Union and Plant Manager Don Sly, Shop Superintendent Mike Blaess, and salesperson Tony Giordana represented Respondent SCI. On December 4, 1980, at a bargaining session, Respondent SCI submitted to the Union a written proposal. On December 8, 1980, the Union handed a letter to Sly requesting information in order to evaluate Respondent's proposal. Sly commented that the payroll department had most of the information but it could be completed in a few days, according to the testimony of Leslie.

Subsequent to the discharge of five of seven unit employees at SCI on November 21, 1980, Respondent was cooperating in a National Labor Relations Board field investigation of unfair labor practices relative to the five terminations.

On December 15 and 21, 1980, the Union again requested information and was informed by Respondent that it would be forthcoming.

On January 5, 1981, the SCI employees filed a petition seeking to decertify the Union as their collective-bargaining representative. The petition is currently pending, as it is blocked by the charge in the instant case.

At the collective-bargaining session held on January 21, 1981, Sly handed Leslie a letter from Respondent's attorney stating that due to the filing of a decertification petition in Case 7-RD-1727, the Company was "constrained to forgo collective bargaining" until the question concerning the Union's majority status was resolved.

Notwithstanding this, SCI did in fact furnish the Union with the requested information by a letter dated January 28, 1981.

Counsel for the General Counsel takes the position that "the Company supplied some, but not all, of the information requested by the Union." Apparently this is based on Leslie's testimony that he did not get the portion of his request for specific information dealing with the pension and whether the Company's pension proposal would meet the requirements of ERISA. The January 28 letter, in evidence as Joint Exhibit 9, reflects that Respondent did reply to this information stating that they intended to discuss those matters with the Union but they had no opinions as of that time. The letter goes on to state:

> We [Respondent] have talked to our actuary and it appears that the retirement age, qualifications for disability pension and early retirement will not add to the cost, and so we would be receptive to any ideas you have on those matters. The hourly cost to the Company of $17 for each year of service is hard to calculate but the actuary has calculated that the

[6] This concession appears at p. 23, par. 1, of counsel for the General Counsel's brief.

[7] See Resp. Exh. 11.

yearly cost to the Company would be about $5,500 per year for a work force of 14 people.

Employee James Giordana, whose anniversary date is April 20, 1979, did not receive his vacation check on April 20, 1981. Similarly, employee Rose Miller, whose anniversary date is April 23, 1979, did not receive her vacation pay on April 23, 1980.

Fortunate testified that he interprets the vacation language in this collective-bargaining agreement the same as in the SEC collective-bargaining agreement. Accordingly, these individuals who were discharged following their participation in an unauthorized work stoppage on November 21, 1980, may be entitled to a prorated vacation payment from April 20, 1980, and April 23, 1980, respectively, through the date of their discharge, if absenteeism and/or tardiness does not preclude same. These witnesses did not testify as to their attendance records nor did Respondent adduce documentary or other evidence relating thereto.

Respondent SCI represented that it will voluntarily undertake to examine its payroll records in an effort to determine if Giordana or Miller are entitled to moneys due them for vacation pay.

The Discharge of David Zehel

Zehel was hired by SEC on March 15, 1979, as a truckdriver which was his job until he was fired on Janaury 9, 1981.

Zehel participated in the strike by being present on the picket line, according to his testimony, 5 days a week.

On the evening of January 9, 1981, Zehel received a mailgram at his home from his foreman stating that he had been discharged for picket line misconduct.

In his testimony Zehel denied that he engaged in any picket line misconduct. Most of Zehel's direct testimony related to his failure to receive vacation pay.

Zehel testified that his attendance was poorer than most employees at SEC. Furthermore, he admitted that Respondent worked with him to avoid terminating him because of his absenteeism record. He recalled at least one occasion where Respondent's representative sat down with him and gave him options and alternatives to overcome his absenteeism problem. He also admitted that he told Fortunate after the strike began that he, Fortunate, should have fired him a long time ago, apparently referring to his absenteeism record.

Zehel testified varyingly, that to his knowledge he did not throw rocks while on the picket line, he did not recall throwing rocks on the picket line, he is positive he did not throw rocks on the picket line, and he did not remember whether he threw rocks while on the picket line, but he was positive that he did not throw rocks on January 9, while on the picket line.

Zehel was asked why he thought he was singled out for discharge in view of the fact that Boone, his foreman, spent a lot of time with Zehel in an effort to keep him from being terminated. Moverover, he was asked if he could think of any reason that Boone would lie or make up a story that Zehel threw a rock at Boone. Zehel's response initially was that he did not know, but that maybe Respondent did not want to pay him his vacation check. He testified further that his vacation check he believed could have amounted to $300 or $400 but he was not sure.

I asked Zehel, while he was testifying, "if after he got the telegram stating that he was fired for picket line misconduct, did he ever communicate with Respondent as to what they were referring to, i.e., what was the misconduct. His response was negative." I asked him further if he was not curious. He responded he was curious but that after he told Leslie he was terminated, Leslie advised him "we will fight it through the NLRB."

Jack Boone, Zehel's foreman, on January 9, 1981, left Respondent's building and went to the picket line because he heard noises, banging on the building's metal doors, with strikers piercing holes in the doors with crowbars.

Boone observed, according to his testimony, approximately 10 strikers gathered around a cardboard partition, utilized as a windbreaker. He saw Zehel standing away from the cardboard partition. Initially, he observed Zehel duck behind the partition and saw his hand come over the top of the cardboard and throw a rock, missing Boone by several feet. According to Boone's testimony Zehel emerged from behind the partition in his full view, and threw a rock at him which struck him near his left shoulder. Boone relates that he was standing approximately 30 feet away. He returned to the office to consult with Respondent's attorney before taking any action. Boone testified that he had discharged approximately 10 other employees for picket line misconduct, following consultation with Respondent's attorney. Respondent's attorney apparently determined that the rock throwing was not privileged picket line conduct and a decision was made to discharge Zehel. That same day Zehel was sent the telegram referred to earlier.

Conclusions and Analysis

Respondent's SEC's Meeting with Employees on November 13

Many of the items delineated by Respondent at the November 13 meeting amounted to less than what was provided for in the expired contract, Respondent characterizes them as "take aways." Therefore to argue that Respondent was attempting to circumvent and undermine the Union by offering to employees what had not been previously proposed to the Union, in an effort to get them to capitulate, raises a vexing question.

In this regard a threshold issue for my determination is the credibility of Leslie *viz-a-viz* the credibility of Fortunate. Fortunate contends *inter alia*, that he submitted a written bargaining proposal to the Union during the second negotiating session and that all of the matters presented to the employees during the meeting had been previously proposed to the Union. Leslie denies that he was handed a written proposal at this second meeting.

Fortunate's testimony was detailed, clear cut, and well defined.

His testimony was unequivocal and he was unerring in his recollection of detail, buttressing his recollection that he did not advance proposals on November 13, not given

to the Union at the second bargaining session. His demeanor evidenced an assuredness in that regard.

Contrarily, Leslie was less than precise, his memory was foggy, details were ambiguous, and his overall recollection was ill defined. Indeed, Leslie admitted his confusion when asked about the Company's proposal to drop the Union's security clause as being one of Respondent's noneconomic bargaining proposals prior to November 13. Leslie responded that he was confused because he believed that Respondent had given him such a proposal in December or January after the strike had ensued. Leslie's recollection of the number of bargaining sessions he engaged in was also faulty. He testified that there were five negotiating sessions. His affidavit in evidence as Respondent's Exhibit 2, states that there were seven or eight negotiating sessions. Moreover, throughout his testimony, Leslie insisted that Respondent did not submit any proposals of any kind prior to November 13. His affidavit reflects that Respondent did propose noneconomic items on October 27, 1980, the second bargaining session. Furthermore, these proposals were submitted and discussed with the Union at this time.

In his affidavit, Leslie admitted that he had in fact discussed changes in the seniority with Respondent prior to November 13. In his testimony he states that there may have been some discussion about seniority and layoff based on ability, as opposed to strict seniority, but he was not sure if that discussion was prior to November 13. This runs directly counter to his early testimony on direct examination that the discussion of skill and ability was "brand new," a "first impression" as of November 13, and "I am positive about that."

I also discredit Faison in any respect where he is in conflict with Fortunate. Faison was terminated by Respondent during the course of the strike, for picket line misconduct. What emerged was his determination to cast reproach upon Respondent.

With reference to omission of the electronic technician classification and the truckdriver classification, Leslie was asked by counsel for Respondent:

> Q. Do you recall some discussions prior to November 13 during your negotiations with Mr. Fortunate about his proposal to eliminate various classifications that appear in the prior agreement and just stick to an A, B, C classification?
>
> A. Yes I do.

Suffice it to say, I resolve all of the conflicts in testimony between Leslie and Fortunate, in favor of Fortunate. I need not therefore address myself to each and every item because I conclude that Fortunate presented all of the enumerated items to the Union prior to the November 13 meeting.

With respect to Fortunate's statements at the November 13 meeting, he was, in my opinion advising the employees of what he was permitted to legally do, i.e., replace economic strikers. Moreover, if unable to function in this posture he has a right to file for Chapter 11 Bankruptcy, and his statements fell within the purview of Section 8(c) of the Act.

Respondent's SEC'S Offer to Potential Strike Replacements

As previously set forth, I have found that all of SEC's wage and benefit proposals had been offered to the Union prior to November 13. Therefore the wage rates for experienced and inexperienced employees were set forth accurately in the want ad. These rates were previously offered.

Joint Exhibit 4, article 12, sets forth the wage rates which would go into effect at the expiration of the agreement. If indeed Respondent put into effect a 25-cent-per-hour wage increase, this is information that should have been in counsel for the General Counsel's hands during the investigation the many months prior to the hearing date. I denied counsel for the General Counsel's motion to amend the complaint in this regard because the motion was made at the 11th hour, it was untimely, a surprise to Respondent, and would have necessitated litigating an entirely new issue; i.e., whether the parties had bargained to impasse. Moreover, it would add nothing to the remedy, if such a remedy was justified as to the other allegations.

Vacation Pay

There is unrefuted testimony in the record that some strikers did receive prorated vacation payments. There is no evidence that because they participated in protected strike activity, certain employees were denied vacation payments. Moreover, Fortunate testified with respect to his interpretation of the criteria and standards to be met before an employee can be considered to have worked a "full month." Fortunate's interpretation cannot be considered bad faith nor is there any evidence of deviating from past practice.

The Union interprets the requisite criteria differently. It is not within my province to substitute my judgment for the parties and interpret the contract.

Accordingly, counsel for the General Counsel has failed to prove a violation of the Act in that regard, and I therefore will recommend dismissal of this allegation.

The same is true for Respondent SCI. The vacation provision and the parties' interpretation of same, parallel their positions as regards the SEC contract. Although Miller and Giordana testified, they did not testify regarding their attendance records nor did any party proffer records to indicate whether or not Miller or Giordana met the standards for vacation pay entitlement, by anyone's interpretation.

Accordingly, I recommend dismissal of this allegation on the same basis as the general allegation of failure to pay employees vacation benefits.

The Discharge of David Zehel

It is clear that during the course of the strike, Respondent acted quickly, and on the advice of counsel in discharging employees who engaged in picket line misconduct. Record evidence reflects that at least seven[8]

[8] Respondent in its brief states that 10 employees were fired for picket line misconduct.

employees terminated and charges were filed. On the morning of the first day of this hearing, the charges relating to two of the alleged discriminatees were withdrawn.

Neither Zehel or any other witness offered any other reason why he was singled out for termination. The fact is, he was not singled out, at least six of his coworkers were fired with him, presumably for picket line misconduct.

The record is free from doubt that Respondent extended itself in accommodating Zehel, an employee with habitual absenteeism. Boone who was meticulous in his testimony, testified without equivocation that Zehel threw a rock at him, hitting him on his shoulder. Moreover, he displayed candor in admitting that the first rock was thrown from behind the cardboard partition and he could not see anything other than a hand emerge from the partition which he believed to be Zehel's.

Zehel denied throwing either rock. He was not a credible witness. He was extremely evasive and shifting in his testimony. One example was his repeated insistence that he had no knowledge of any damage to SEC's bay doors or, that he knew that they had been replaced. His affidavit reflects that he had in fact seen the damaged doors with the holes pierced in them. On at least four occasions, he denied this during the course of his testimony and only admitted it when confronted with his affidavit. There is also evidence in this record that Zehel had a proclivity for spontaneous violence.

Perhaps sensing that I would credit Boone over Zehel, which I do, counsel for the General Counsel argues alternatively that rock throwing is merely impulsive minor misbehavior that can be expected on a picket line. She cites no cases in that regard. Case law runs counter to her proposition. The fact that Boone did not lose an eye or was not injured in any other way is totally irrelevant. Zehel's conduct exceeded permissible bounds of strike conduct.

Cf. *Jai Lai Cafe, Inc.*, 200 NLRB 1167 (1973), where rock throwing was alleged as the basis for discharge, but the Administrative Law Judge discredited the witness to the alleged incident.

Nor do I consider his conduct a mere "moment of animal exuberance." See *Milk Wagon Drivers Union, etc.* v. *Meadowmoor Dairies, Inc.*, 312 U.S. 287 (1941).

Accordingly, I find Zehel's conduct during the course of this economic strike to be unprotected, and recommend dismissal of the 8(a)(1) and (3) allegations.

Failure to Provide Information in a Timely Manner

On December 8, 1980, at a bargaining session Leslie handed a letter to Sly, SCI's representative requesting certain information. Less than a month later, on January 5, 1981, a RD petition was filed in Case 7-RD-1727 raising a question concerning representation. Thus during the period between December 8 and January 5, there was the intervening holiday season, Christmas and New Year's Day. Moreover, SCI had recently terminated a large segment of its work force and was in the process of presenting evidence to an investigator of the National Labor Relations Board, defending its position and presenting evidence that the discharges were for employees engaging in unprotected activity.

Under the circumstances, I do not find that it was an unreasonable duration of time by January 5, and SCI did not engage in dilatory tactics. It is clear that after January 5, Respondent SCI was not legally obligated to continue bargaining or furnish information. Nevertheless, on January 28, 1981, SCI did in fact furnish the Union with the requested information.

Accordingly, I would recommend that the alleged violations of Section 8(a)(1) and (5) of the Act be dismissed.

On the morning of the second day of the hearing there was an untimely request by Respondent for the investigative affidavits of Leslie and Faison who had already been examined on direct and cross-examination. Counsel for the General Counsel objected to the request on the basis of its untimeliness. In view of the fact that I considered it within my discretion to grant or deny Respondent's request, I granted the request for two reasons. First, I did not believe it would unduly delay the hearing because counsel for Respondent intended to limit the cross-examination, and not go into matters he had gone into the day before. The second reason is that Respondent could simply call these individuals under Federal Rule 611(c) to testify regarding matters relative to Respondent's defense. Moreover, by allowing the additional cross-examination with the affidavits, I could see no reason or basis for counsel for the General Counsel's case to be prejudiced in any way.

Counsel for the General Counsel then sought to recess the hearing so she could prepare an interlocutory appeal to my ruling on the Jencks Act motion. I denied her motion to recess the case and advised her that it was improper to hold up a hearing for this kind of a matter, and she could prepare a interlocutory appeal at some other time. I further advised her that if she does not prevail on the merits of the case, she can appeal my ruling to the Board, and if I committed prejudicial error the Board would accordingly reverse me.

On March 2, 1982, counsel for Respondent sent a document as a supplement to the record in this case. The document is a copy of the Office of Appeals denial of an appeal filed by the Charging Party in this matter. Counsel averred that the document is relevant in assessing the credibility of Fortunate. Specifically, counsel contends that this copy of the letter from the General Counsel's Office of Appeals directly reflects on the credibility of Fortunate regarding the termination of Zehel.

On March 8, 1982, counsel for the General Counsel filed a Motion to Strike Respondent's March 2 letter and "Supplement to the Record." Counsel for the General Counsel contends, *inter alia*, that Respondent is raising matters for my consideration which were not litigated during the hearing and matters not introduced in evidence at the hearing, as constituting an attempt to amend its brief, subsequent to the time that the parties have submitted their briefs.

On March 10, Respondent filed a reply to counsel for the General Counsel's Motion to Strike.

I hereby grant counsel for the General Counsel's Motion to Strike for the reasons asserted therein. More-

over, I have not taken into consideration Respondent's motion to supplement the record or its attachment in my assessment of Fortunate's credibility.

Based on my foregoing findings and conclusions, I will recommend that the 8(a)(1), (3), and (5) allegations of the complaint, and the entire complaint be dismissed.

CONCLUSIONS OF LAW

1. Both Respondents SEC and SCI are engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The units of both Respondents are appropriate as pleaded in the consolidated amended complaint.

4. The allegations of the complaint that Respondent has engaged in conduct violative of Section 8(a)(1), (3), and (5) of the Act have not been supported by substantial evidence.

Upon the foregoing findings of fact, conclusions of law, and upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following:

ORDER[9]

It is recommended that the complaint herein be, and it hereby is, dismissed in its entirety.

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[9] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.